

**UNDER CHAPTER ELEVEN OF THE NAFTA  
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

**VITO G. GALLO**

**Claimant**

AND

**GOVERNMENT OF CANADA**

**Respondent**

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**CLAIMANT'S SUBMISSIONS**

**FEBRUARY 29<sup>th</sup>, 2008**

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## OVERVIEW

This arbitration arises out of the Government of Ontario's passage of the *Adams Mine Lake Act* (Appendix "A"), which constitutes an uncompensated expropriation under Article 1110 of the *North American Free Trade Agreement*.

Pursuant to the Tribunal's instructions, the parties have consulted and have proposed a Draft Procedural Order and a Draft Confidentiality Order for the Tribunal's consideration. As reflected in the text of the draft orders, a few issues exist for which consensus could not be achieved. Those issues are:

- (I). Place of arbitration and location of hearings (Agenda items 1(a), 1(b) and 1(c));
- (II). Confidentiality of the proceedings and the hearings (Agenda items 1(d), 2(b) and (d)-(e)-(f));
- (III). Matters pertaining to the hearing including transcription of proceedings and orders regarding witnesses (Agenda items 1(e)-(g));
- (IV). Participation of Non-Parties and of Amicus Curiae (Agenda Item 1(h));
- (V). The inclusion of the Province of Ontario and Municipalities of Toronto, York, Durham, Peel and Timiskaming in the confidentiality order (Agenda item 2(a)); and
- (VI). Whether Canadian law can or should be applied in determination of issues of production, as proposed by the Government of Canada (Agenda Item 2(c)).

### I. PLACE OF ARBITRATION AND LOCATION OF HEARINGS

The first three items on the agenda are as follows:

- 1.A. Administering Authority and Tribunal Assistant (Procedural Order No. 1, at paras. 11-12);
- 1.B Place of Arbitration (Draft Procedural Order No. 1, at para. 15);
- 1.C Location of Hearings (Draft Procedural Order No. 1, at para. 16);

*(1.A). Administering Authority*

The need for an administering authority depends on where the Tribunal determines that evidentiary hearings are to be held. If oral hearings are to be held in either Washington D.C. or New York City, the Permanent Court of Arbitration should be retained to administer the proceeding. The PCA has arrangements with ICSID in Washington D.C. and the American Arbitration Association regarding the use of their facilities in New York. The PCA can organize the hearings and administer them more effectively than the parties can.

If oral hearings are to be held in Toronto, the Claimant wishes to accept the Chairperson's offer to administer the proceeding through his law firm. As demonstrated in the preparations undertaken to stage this procedural meeting, the parties can arrange such matters as the hearing room and the court reporter without the assistance of an administering authority such as the PCA.

*(1.B). Place of Arbitration (Draft Procedural Order No. 1, at para. 15-16)*

The Investor submits that the seat of this arbitration should be Washington, DC.

NAFTA Article 1130 provides that, unless the parties agree otherwise, the place of a Chapter 11 arbitration proceeding under the UNCITRAL Arbitration Rules must be in territory of a NAFTA Party which is a Party to the New York Convention (i.e. Canada, the USA or Mexico). It also specifies that the place (i.e. the seat or *situs*) shall be chosen in accordance with the applicable arbitral rules.

Article 16(1) of the UNCITRAL Arbitration Rules stipulates that, absent agreement by the parties, the Tribunal has discretion to decide the seat of arbitration, "having regard to the circumstances of the arbitration." Article 16(2) provides further that a tribunal may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration. Thus, the drafters of the UNCITRAL Arbitration Rules recognized and provided for a decoupling

of the designation of *situs* from the decision on where evidentiary hearings should be physically held.

The decoupling of *situs* from location is well-established in international arbitration practice.<sup>1</sup> NAFTA Article 1131(1) states that the Tribunal shall decide the dispute in accordance with the NAFTA and the applicable rules of international law. The Claimant submits that applicable principles of international law and the practice of arbitral tribunals in designating *situs* and location must be regarded as forming part of the circumstances under which an UNCITRAL tribunal shall make such determinations. It is therefore appropriate for the Tribunal to recognize that its decision as to designating the seat of this arbitration should not be confused with its determination as to where oral hearings would best be heard.

Paragraph 22 of the *UNCITRAL Notes on Organizing Arbitral Proceedings* (the “Notes”) provides a non-binding<sup>2</sup> commentary for parties on the determination of both *situs* and location of hearings for an UNCITRAL arbitration. It provides:

Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

The guidance contained within this provision could be misconstrued as establishing a combination-test for determining an arbitral seat based upon factors that are not relevant to the issue, given the circumstances of an arbitration. In this regard, the Claimant submits that only sub-paragraphs (a) and (b) are relevant for determining *situs* in the

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<sup>1</sup> See, generally: P. Kirby, “The Choice of the Place of Arbitration under NAFTA Chapter 11” in T. Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational: New York, 2004) at page 341; Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Fourth Edition, Sweet & Maxwell, London, 2004, at page 83.

<sup>2</sup> *United Parcel Service of America, Inc. v. Government of Canada*, (“UPS v. Canada”) Decision of the Tribunal on the Place of Arbitration, October 17, 2001, at para. 6. The *UPS* Tribunal confirmed that the UNCITRAL Notes are “not binding” and that “an arbitral tribunal remains free to use the notes as it sees fit and is not required to give reasons for disregarding them.”

instant arbitration, considering the practice of decoupling seat of arbitration from location of witness hearings. These sub-paragraphs concern a matter of paramount importance: whether a tribunal will receive the assistance it or the parties require from local courts when asked, without fear of undue interference by local courts in respect of the recognition or enforcement of the tribunal's award. In contrast, sub-paragraphs (c) to (e) of the Note are concerned with practical matters that must be considered in selecting the appropriate location for an evidentiary hearing: convenience; availability of support services; and proximity of evidence.<sup>3</sup>

In addition to the practice of decoupling *situs* from location of hearing, there are two other applicable principles of international arbitral law that must be considered in designating the arbitral seat. These principles are: ensuring the equality of the parties in an arbitration (also reflected in Article 15(1) of the UNCITRAL Arbitration Rules); and preferring neutrality for the chosen seat. In this case, complete neutrality is not possible to achieve, given the consensus of the parties reflected in their alternative suggestions as to the seat of this arbitration: Washington, D.C. or Toronto, Ontario. Neither party is prepared to accept a place in Mexico as being a suitable *situs* for the arbitration. Therefore the place of arbitration must be in either the home country of the Claimant or the Respondent.

As between a seat in the United States versus Canada, the Claimant submits that it is impossible to respect the principle of neutrality in seating an arbitration against a State within the territorial jurisdiction of that State. This was the penultimate finding of the Tribunal in *UPS v. Canada* in favour of Washington, D.C., where it was stated:

Neutrality has been identified as a factor relevant to the place of arbitration (although it is not in the UNCITRAL list), for instance in the

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<sup>3</sup> The Claimant submits that the specific question of location of the subject matter in dispute is resolved by NAFTA Article 1130, which requires an arbitration to be sited within North America unless the parties agree otherwise. In any Chapter 11 proceeding, the subject matter in dispute is always an articulation of rights granted within the context of a comprehensive, trilateral treaty designed to foster continental economic integration. Thus, the location of the subject matter in dispute in a Chapter 11 proceeding, of necessity, is North America. In addition, Article 1130 also reinforces the importance of the suitability of domestic law in respect of the protection of awards by requiring the place of arbitration to be in a country in which the New York Convention is in force.

*Methanex* decision [at] para's. 35-39. Canada addressed it in its submission. That factor is plainly relevant given the broad reference to "the circumstances of the arbitration" in Article 16(1) of the UNCITRAL rules (para. 2 above).

In one sense a neutral place is not available given that the claimant is a United States corporation and Canada is the respondent and the place of the arbitration is to be in one or the other country. It is however relevant that it is Canada's measures that are at issue, even if it has been the place of arbitration in all Chapter 11 disputes in which it has been the respondent. It is also relevant that Washington, D.C. can be seen as having the neutrality of being the seat of the World Bank and ICSID, rather than the seat of federal government in the United States of America. And UPS' headquarters are in Atlanta, Georgia.<sup>4</sup>

Sub-paragraph (b) of the aforementioned Notes is seemingly satisfied by the existence of international agreements for the enforcement of awards as between Canada and the United States, although as noted above it is one thing to agree to the obligations of the *New York Convention* and another to fully implement them in daily practice. As such, as reflected in sub-paragraph (a) of the Notes, the Claimant submits that there are effectively only two issues relevant to the Tribunal's determination of the seat of this arbitration: suitability of the law on arbitral procedure of the place of arbitration; and preservation of the equality of the parties.

#### *Equality of the Parties and the Lex Arbitri*

Equality of the parties is best preserved in any investor-state case by ensuring that the State party does not obtain a tactical or procedural advantage by virtue of the *lex arbitri*, of the arbitral seat. This is the primary advantage of delocalized arbitration available under the *ICSID Convention* but not yet available to NAFTA claimants.<sup>5</sup> For an UNICTRAL NAFTA arbitral tribunal, the local court's abilities to assist, support and/or control the progress of the arbitration and its result are matters of significant concern.

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<sup>4</sup> *UPS v. Canada*, Decision on Place of Arbitration, October 17, 2001, at para's. 17-18.

<sup>5</sup> Until Canada ratifies its ascent to the *ICSID Convention*, it will not be possible for an ICSID arbitration (as opposed to an ICSID Additional Facility arbitration) to be launched by a United States claimant against the Government of Canada.

<sup>7</sup> *Op cit.*, supra, note 2 at para 13-15 and 19.

*The Respondent's Policy on Annulment Standards*

The concern about inequality of the parties in respect of the suitability of the law of the host State initially arises from the practice of the Government of Canada in pleading arguments before its local courts in favour of the annulment of NAFTA awards against itself and the Government of Mexico. These arguments have been contrary to the spirit and substance of the UNCITRAL Model Law. This same concern was acknowledged by the NAFTA/UNCITRAL Tribunal in *UPS v. Canada*, in a decision that resulted in its choosing Washington, D.C. as a more appropriate place for the seat of its arbitration, despite the fact that the location of the evidence and balance of convenience seemed strongly to favour Ottawa, Ontario.<sup>7</sup>

For example, in *S.D. Myers v. Canada*,<sup>8</sup> the Government of Canada argued that two interim awards, as well as the final award made against it should be set aside by its own Federal Court in application of Canada's Commercial Arbitration Code, on the grounds that the tribunal exceeded the scope of NAFTA Chapter 11, in addition to a claim that they violated the public policy of Canada. In attempting to set aside a damages award rendered by a NAFTA / UNICTRAL tribunal presided over by Prof. Martin Hunter, the Respondent argued that a standard of correctness should be applied to the Tribunal's reasons for decision. It added that the Tribunal's reasons for decision were not to be accorded any deference by the Court.<sup>9</sup> In making these arguments, the Government of Canada observed:

137. A NAFTA Chapter Eleven Tribunal is an *ad hoc* body whose members are not necessarily chosen for their knowledge of trade law generally or of NAFTA Chapter Eleven in particular. Unlike the Canadian International Trade Tribunal or the World Trade Organization panels, NAFTA Chapter Eleven Tribunals are not standing tribunals with established or recognized expertise in trade matters.

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147. All these factors lead inexorably to the conclusion that the standard of review for conclusions of law made by Chapter Eleven Tribunals is "correctness", particularly for present purposes where the question is whether an

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<sup>8</sup> [2004] F.C.J. No. 29 (F.C.)

<sup>9</sup> Canada's Amended Memorandum on Fact and Law, Federal Court File No. T-81-03 (undated), at pages 37-40.

award deals with a dispute contemplated or falling within the scope of the arbitration. As Bastarache J explained in *Pushpanathan v. Canada (M.C.I.)*:

Although the language and approach of the ‘preliminary’, ‘collateral’ or ‘jurisdictional’ question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of ‘jurisdictional questions’ which may be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which ‘goes to jurisdiction’ is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. ***In other words, ‘jurisdictional error’ is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference should be shown.***<sup>10</sup> Emphasis added [by Canada]

Participating as intervener, Mexico supported Canada in its arguments for the annulment of the *S.D. Myers* awards on a standard of correctness – arguing that a court operating under the municipal arbitration law of Canada should annul an award whenever it concludes that a NAFTA tribunal had erred in respect of a legal issue seen as going to the tribunal’s jurisdiction. The Government of Canada took a similar position in the two other NAFTA awards that have been challenged in Canadian courts: *Metalclad v. Mexico*<sup>11</sup> and *Feldman v. Mexico*.<sup>12</sup> In both of these appeals, Canada agreed with Mexico that no deference should be shown to the decision-making capacity of a NAFTA tribunal in respect of legal issues that the applicants considered to be jurisdictional in nature.<sup>13</sup>

Ontario’s courts dismissed these arguments in *Feldman*,<sup>14</sup> while the Federal Court of Canada in *S.D. Myers* dismissed this portion of the application on the basis that the

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<sup>10</sup> Ibid.

<sup>11</sup> 2001 B.C.S.C. 664

<sup>12</sup> *Mexico v. Karpa* [2003] O.J. No 5070 (Ont S.C.J.)

<sup>13</sup> Decision in *United Mexican States v. Metalclad*, 2001 BCSC 664, and at paragraph 55; and Memorandum of Fact and Law of Canada – Intervener, dated October 27, 2003 in Ontario Superior Court of Justice File No. 03-CV-23500, paragraphs 2 & 8.

<sup>14</sup> *United Mexican States v. Feldman*, Ontario Superior Court of Justice, Court File No. 03-CV-23500 at paras 77-81, upheld on appeal, Ont Court of Appeal, docket C41169, paras 1-3 (Note; Canada appeared at Superior Court Level but not the Court of Appeal.



Government of Canada had failed to raise its ‘jurisdictional’ objections during the arbitration and was thus barred from making them before the Court.<sup>15</sup> For its part, the Court in *Metalclad* annulled the majority of the legal findings of a unanimous NAFTA Tribunal, chaired by Sir Eli Lauterpacht, on the basis that Sir Eli and his co-arbitrators had interpreted the meaning of the terms “international law, including fair and equitable treatment” in Article 1105 incorrectly.<sup>16</sup>

As demonstrated above, whereas the Government of the United States did not seek to intervene in any of these three NAFTA annulment proceedings, on all three occasions the Governments of Mexico and Canada have taken positions on the standard of review allegedly required of a Canadian Court in respect of NAFTA tribunal awards that are contradictory to the terms and spirit of the *UNICTRAL Model Law* and *New York Convention*. In attempting to supplant the judicial review standards applicable in its own administrative law for the standards set out in its Model Law-based arbitration statute, a serious question arises as to whether Canada is a suitable place to conduct an arbitration especially in circumstances where the Government of Canada is the Respondent.

*The Measure at Issue, the “Adams Mine Lake Act”*

The circumstances of the instant arbitration are of more concern than a typical NAFTA arbitration involving the Government of Canada, due to the nature and scope of the measure at issue. Section 5 of the *Adams Mine Lake Act*<sup>17</sup> in this dispute provides, in relevant part:

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<sup>15</sup> *Canada v. S.D. Myers*, Federal Court of Canada File No 2004 FC 38 at para 53

<sup>16</sup> The Court accepted arguments from counsel for the Government of Mexico and the Government of Canada that the Tribunal had exceeded its jurisdiction because it had found that the “fair and equitable treatment” standard under Article 1105 encompassed a requirement to provide a transparent regulatory regime. On its web site, the Government of Canada claims that the award was partially annulled on this basis alone, although it is more accurate to say that the Court found that in citing NAFTA Article 1803, the Tribunal had exceeded its jurisdiction. See: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/Mun-metalclad.aspx?lang=en>

Regardless of what one believes about the place of transparency within the meaning of “fair and equitable treatment” (and the Claimant submits it is obviously very relevant, as other tribunals have also concluded), it is obvious that an UNCITRAL tribunal hearing a treaty claim is entitled to be “wrong” without being found by a local court to have somehow exceeded its jurisdiction in doing making a finding of international law.

<sup>17</sup> S.O.2004, c.6

*Extinguishment of causes of action*

5. (1) Any cause of action that exists on the day this Act comes into force against the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands described in Schedule 1 is hereby extinguished.

*Same*

(2) No cause of action arises after this Act comes into force against a person referred to in subsection (1) in respect of the Adams Mine site or the lands described in Schedule 1 if the cause of action would arise, in whole or in part, from anything that occurred after December 31, 1988 and before this Act comes into force.

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*Enactment of this Act*

(4) Subject to section 6, no cause of action arises against a person referred to in subsection (1), and no compensation is payable by a person referred to in subsection (1), as a direct or indirect result of the enactment of any provision of this Act.

*Application*

(5) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action in respect of any agreement, or in respect of any representation or other conduct, that is related to the Adams Mine site or the lands described in Schedule 1.

*Same*

(6) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action arising in contract, tort, restitution, trust, fiduciary obligations or otherwise.

*Legal proceedings*

(7) No action or other proceeding shall be commenced or continued by any person against a person referred to in subsection (1) in respect of a cause of action that is extinguished by subsection (1) or a cause of action that, pursuant to subsection (2) or (4), does not arise.

*Same*

(8) Without limiting the generality of subsection (7), that subsection applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief.

*Same*

(9) Subsection (7) applies to actions and other proceedings commenced before or after this Act comes into force.

*No expropriation*

(10) Nothing in this Act and nothing done or not done in accordance with this Act constitutes an expropriation or injurious affection for the purposes of the Expropriations Act or otherwise at law.

Two very serious concerns arise from how this measure could potentially affect the *lex arbitri* of the arbitration if its *situs* is in Canada. These concerns go beyond the substantive NAFTA breaches about which the Investor claims. First, the provision above threatens the Claimant's and the Tribunal's ability to call upon a local court to assist in the arbitration. Second, the provision above could serve as an additional basis for the attempted annulment of the Tribunal's award on the grounds of violation of the public policy of the host jurisdiction.

*Potential Impact of the Measure in respect of the Lex Arbitri*

Subsections 5(7) and 5(8) of the measure provide that no proceeding shall be commenced by any person against “the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands [that are also the subject of this NAFTA claim].” It is very clear from the language of this provision that if Toronto, Ontario was selected as the *situs*, the Claimant may not be permitted to seek the assistance of an Ontario court to obtain document production or the attendance of a witness, which would otherwise be contemplated under applicable law.<sup>18</sup>

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<sup>18</sup> See, e.g. *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands*, (2006) 13 BLR (4th) 1 (Alta CA), leave denied (SCC 1 June 2006), where pre-hearing, documentary discovery of a third party was enforced by the Court.

*Potential Application for Annulment on the Grounds of “Public Policy of the State”*

If the seat of this arbitration is Toronto and the Tribunal renders a final award in favour of the Claimant, the Respondent is likely to seek annulment of the award on the basis that its recognition or enforcement would be contrary to the public policy of the State under Article 36(1)(b)(ii) of the UNCITRAL Model Law, which is legislated by reference in both the Canada *Commercial Arbitration Act* (Section 5(2)) and the Ontario *International Commercial Arbitration Act* (section 10).<sup>19</sup>

Subsection 5(10) of the measure provides that neither the measure nor any action or inaction undertaken in accordance with it shall constitute an expropriation “at law.” The term “at law” is juxtaposed against the Province’s *Expropriations Act*,<sup>20</sup> meaning that “at law” must serve some other purpose. While the Claimant would argue that the law to which the measure refers must be municipal common law, the provision is ambiguous and therefore susceptible to improper interpretation by a Canadian court.

Again, subsection 5(8) of the measure casts an extremely broad net in prohibiting “any action or other proceeding claiming any remedy or relief, including... any form of compensation or damages.” The Claimant would argue that this NAFTA claim is against the Crown in the Right of Canada, rather than the Crown in the Right of Ontario, and that therefore the measure cannot apply directly to an enforcement proceeding. However, if the Tribunal is seated in Toronto it could nonetheless be argued by the Respondent that any enforcement proceeding taking place in Ontario concerning an award rendered by the Tribunal could contravene the State’s public policy (in the person of Ontario), given the clear statutory intent of the measure.<sup>21</sup>

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<sup>19</sup> The Claimant strongly notes, however, that in drawing the Tribunal’s attention to the concerns referenced here in, that it is not admitting the validity of any of the potential applications of the measure at issue in this case.

<sup>20</sup> R.S.O. 1990, c. E.26

<sup>21</sup> This potential ground of annulment is of particular concern given that section 92(16) of the *Constitution Act* 1867 provides that the regulation of “property and civil rights” is reserved to the provinces of Canada, rather than the Federal Government.

This would not be the first time that the Respondent pleaded public policy of the State would be violated by imposing a damages award upon it for a measure whose purposes it deems to be a matter of public policy. In *S.D. Myers*, it argued that it was contrary to the public policy of Canada because it “penalized” Canada for imposing a measure that it claimed was necessary to fulfill its obligations under another international convention.<sup>22</sup>

A statute, validly in force as a matter of local law and as understood within the context of that local law, could be construed by a court bound to apply that local law as being the “public policy” of the State in question. These provisions pose an unnecessary risk to the integrity of any award potentially issued by the Tribunal in favour of the Claimant. This annulment risk can entirely be avoided by designating Washington, D.C. as the seat of the arbitration.

*(1.C) . Location of Hearings*

In respect of the physical location of the hearings, the Claimant submits that practical issues should guide the Tribunal, as suggested in sub-sections (c) to (e) of the relevant UNICITRAL Note. The Claimant has proposed either Washington D.C. or New York City as the place for the hearings to occur. It is submitted that both Washington D.C. and New York are equally as convenient as Toronto, Ontario. Given that this is not a case where the use of physical exhibits would be expected, it is unnecessary to determine location of the oral hearing based upon proximity of the evidence. If proximity to the evidence was crucial, the oral hearings would need to be held in rural, northern Ontario, where the Adams Mine waste treatment facility was to be located. In the interests of cost-effectiveness and relieving administrative burden, the Respondent suggests that a PCA-administrated arbitration in Washington DC or New York would be most appropriate.

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<sup>22</sup> *S.D. Myers v. Canada*, Canada’s Amended Memorandum of Fact and Law, Federal Court of Canada File No. T-81-03 (undated), at para’s. 229-232.

## II. PRIVACY/CONFIDENTIALITY OF PROCEEDINGS AND HEARING

The agenda items to be addressed relating to privacy and confidentiality of the proceedings and hearings are as follows:

- 1(d). Public Access to Documents (Draft Procedural Order No. 1, at paras. 22, 35);
- 2(d). Whether the Hearings should be held *in camera* pursuant to *UNCITRAL Arbitration Rule 25(4)* or, as proposed by the respondent, in public (Draft Confidentiality Order No. 1, at para. 13);
- 2(e). Whether Public Disclosure of Pleadings, Submissions, Exhibits and Transcripts should occur, as proposed by the respondent (Draft Confidentiality Order No. 1, at para. 14);
- 2(f). Return of Documents (Draft Confidentiality Order No. 1, at Appendix A, para. 3);

These agenda items address the privacy and confidentiality of the hearing and of the documents filed.

### *II.A. Privacy/ Confidentiality of the Hearings*

UNCITRAL Rule 25(4) is explicit, requiring that “hearings shall be held *in camera* unless the parties agree otherwise.” The Claimant has not agreed to a public hearing and, therefore, has an absolute right to an *in camera* hearing.

NAFTA Article 1120(1) provides the Claimant with the choice of selecting the ICSID Additional Facility Rules or the UNCITRAL Rules. The fact that the UNCITRAL Rules provide for an *in camera* hearing was one of the reasons why the Claimant elected those rules to govern this proceeding. In contrast, the ICSID Additional Facility Rules are silent as to public dissemination of written submissions and evidence and in respect of the oral hearing it provides:

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(2) The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.

Had the Claimant been unconcerned about the privacy and confidentiality of these proceedings, he could have chosen the ICSID Additional Facility Rules. Similarly, had the NAFTA Parties intended for all written and oral hearings to be open to the public, they could have said so in the NAFTA text. They did not, although the Parties clearly contemplated circumstances in which their agreement would override provisions of the chosen arbitration rules. NAFTA Article 1120(2) provides that the “applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”

NAFTA Chapter 11 does not modify UNCITRAL Rule 25(4). Nowhere in the NAFTA text is it provided that either written or oral hearings shall be open to the public. Instead, it contains provisions indicating that the Parties recognised that hearings would take place *in camera* when the UNCITRAL Rules were chosen. This is why Article 1129 specifically provides that the other two NAFTA Parties have a right to receive the evidence and written arguments of the disputing parties. NAFTA also provides in Article 1137(4) and Annex 1137.4 that a final award rendered against Canada or the United States must be published. The Annex provides that the selected arbitration rules will govern awards rendered involving Mexico. If there were some sort of general principle of public access to arbitration, these provisions would have been completely unnecessary.

Unsurprisingly, previous UNCITRAL arbitrations involving Canada have been held in camera when the parties did not agree otherwise, including the *S.D. Myers*<sup>23</sup> and *Pope & Talbot*<sup>24</sup> cases, as well as the *Chemtura* arbitration, whose tribunal heard the same

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<sup>23</sup> *S.D. Myers v. Canada*, Procedural Order 16, NAFTA/UNCITRAL Arbitration (May 13, 2000) at para. 16.

<sup>24</sup> *Pope & Talbot v. Canada*, Procedural Order No 5, April 10, 2001

arguments Canada is making in this case only months ago but nonetheless ordered that the arbitration shall be held *in camera* as per Article 25(4) of the UNCITRAL Arbitration Rules.<sup>26</sup>

The Claimant does not agree to either the written or the oral hearings in this arbitration being open to the public. He submits that the mandatory wording of Article 25(4) leaves no discretion for the Tribunal in the matter. Hearings must be held *in camera* unless the parties agree otherwise. Only the award(s) of the Tribunal shall be made public, subject to the appropriate redactions.

### *II.B. Privacy/Confidentiality of the Documents*

In the interests of public disclosure, the Claimant will consent to the initial pleadings in this arbitration (i.e. the Notice of Arbitration, Statement of Claim, Statement of Defence and any Reply) being made available to the public, with the appropriate redactions of confidential information. The Claimant will also consent to the Tribunal's procedural orders being made public, in addition to the publication of awards pursuant to NAFTA Article 1137(4) and Annex 1137.4. The publication of these documents addresses any public interest that may lie in knowing of the basic elements of the dispute.

Pursuant to Article 25(4) of the UNCITRAL Arbitration Rules, witness statements, expert reports, the transcripts of the hearing and the arguments should not be published; not even in redacted form. The right to an "*in camera*" hearing establishes a specific right of privacy and confidentiality with respect to all aspects of the hearing. As defined in Black's Law Dictionary, "*in camera*" means:

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<sup>26</sup> The same conclusion was reached in 2005 by the UNCITRAL tribunal in *Ulemek v. Croatia*, involving the claim of a Canadian investor under the Canada-Croatia Foreign Investment Promotion and Protection Agreement.



In chambers, in private. A term referring to a hearing or any other judicial business conducted in the judge's office or in a courtroom that has been cleared of spectators.

It is the "judicial business" to which the right of privacy extends; not merely the exclusion of the public from hearing.

Moreover, Article 15(2) of the UNICTRAL Arbitration Rules establishes that the hearing is specifically for the presentation of evidence and argument:

If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.

The entire purpose of the hearing is presentation of evidence and argumentation. It is absurd to suggest that the Claimant's right to privacy can be maintained if publication of any more than necessarily redacted versions of the primary pleadings and awards is to take place. The Respondent appears to intend to publish the memorials including witness statements, expert reports and the full arguments exchanged in this proceeding, including transcripts of oral hearings. There is no privacy if every single document, witness statement, expert report, argument and transcript of the hearing is published.

On behalf of the Tribunal in *S.D. Myers vs. Canada*,<sup>27</sup> Professor Hunter stated the following in its Procedural Order No 16:

8. The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any general principle of confidentiality exists in an arbitration such as that currently before this Tribunal. ...

10. Article 25.4 of the [UNCITRAL] Rules states:

*Hearings shall be held in camera unless the parties agree otherwise*

...

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<sup>27</sup> *S.D. Myers v. Canada*, Procedural Order 16, NAFTA/UNCITRAL Arbitration (May 13, 2000)

11. Following common practice in international commercial arbitrations, the Tribunal directed that the evidence-in-chief ('direct testimony'), the opening submissions and the trial exhibits should be delivered to the Tribunal and exchanged between the parties in advance of the substantive hearing. Much of this material would otherwise have been presented at the hearing and, pursuant to Article 25.4 of the Rules, would have remained private as between the parties and the Tribunal.
12. It would be artificial and might adversely affect the efficient organization of Chapter 11 arbitration proceedings if such materials were to be deemed to be less private merely because they were to be delivered in advance of an oral hearing, or even after to it in the form of post-hearing briefs. Such written materials effectively form part of the hearing. The same level of confidentiality that is conferred on the transcripts of the opening and closing submissions and witness testimony must logically be applied to equivalent written materials. It would 'drive a coach and horses' through Article 25.4 of the Rules if any other conclusion were to be reached.
13. Furthermore, Article 25.4 is written in mandatory terms ('Hearings shall be held ... unless ...'). A close examination of the manner in which Section III of the Rules was crafted reveals that the drafters had the distinction between mandatory and permissive terminology well in mind. Accordingly, the Tribunal takes the view that it has no authority to derogate from the provision contained in Article 25.4 in the absence of the agreement between the parties.

Approximately one year after this determination was rendered, the Free Trade Commission issued its *Notes of Interpretation of Certain Chapter 11 Provisions issued by the NAFTA Free Trade Commission, July 31<sup>st</sup>, 2001* ("Notes of Interpretation") stating in part:

In accordance with Article 1120(2), the NAFTA parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, *apart from the limited specific exceptions set forth expressly in those rules.* ("emphasis added")

The Notes of Interpretation accordingly recognize Article 25(4) of the UNCITRAL Arbitration Rules, and the specific duties of privacy and confidentiality that arise from it. These Notes do not amend or abridge Article 25(4), nor could they. This is why the *Pope & Talbot* NAFTA Tribunal concluded that the Notes of Interpretation had not modified UNCITRAL Rule 25(4) and that the transcripts should not be published.

The Tribunal observes that the [*Notes of Interpretation, July 31<sup>st</sup>, 2001*] applies only to documents “submitted to, or issued by, a Chapter Eleven tribunal.” Certain of the material that Canada proposes to make public are not either, but are transcripts of the hearings. To the same point, the Interpretation recognizes that the arbitral rules referred to in Article 1120(2) may set forth specific exceptions that may preclude disclosure. As noted, the UNCITRAL rules do contain a specific provision requiring *in camera* hearings, unless the parties agree otherwise. That exception would surely cover transcripts of those hearings.

There is no principled difference between the transcripts and the other forms of evidence to be adduced such as the witness statements and expert reports produced as a convenience in advance of the hearing to facilitate the narrowing of issues and cross-examination.

Professor Hunter is the co-author of the leading text on international arbitration,<sup>29</sup> and it has been made clear in the most recent edition published in 2004 that his views have not changed:

If the hearing is to be private, it would seem to follow that the documents disclosed and the evidence given at that hearing should also be – and should remain – private. In principle, there would seem to be no point in excluding non-participants from an arbitration hearing if they can later read all about it in printed articles or on an authorised website.<sup>30</sup>

The text reviews the current trend and the issue of public interest in an investor-state arbitration and indicates that “[t]he increasing number of arbitrations in which there is a legitimate public interest, such as the NAFTA arbitrations which have been discussed and the ICSID arbitrations which are discussed later, has led to an erosion of the concept of confidentiality, with pleadings and awards being publicly available on the internet and elsewhere.”<sup>31</sup> It is submitted that the publication of the redacted pleadings, procedural orders and awards satisfy whatever public interest issue exists in NAFTA Chapter 11 cases. It does not require publication of the evidence in the hearing nor the arguments.

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<sup>29</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Fourth Edition, Sweet & Maxwell, London, 2004, at pages 27-35.

<sup>30</sup> *Ibid.*, at 28

<sup>31</sup> *Ibid.*, at 33

It is notable that in *Myers* the Tribunal held that even with respect to consultation as between federal officials and their provincial counterparts (rather than the Canadian public), it was sufficient for Canada only to disclose the pleadings, procedural orders and the eventual awards to their provincial counterparts.<sup>32</sup>

It is therefore submitted that the agenda items dealing with the issue of privacy and confidentiality of the proceedings should accordingly be determined in the following manner:

- 1(d). Only the pleadings (subject to redaction), procedural orders and awards be published (Draft Procedural Order No. 1, at paras. 22, 35)
- 2(d). The hearings should be held *in camera* pursuant to *UNCITRAL Arbitration Rule 25(4)* as there is no agreement of the parties to hold them in public (Draft Confidentiality Order No. 1, at para. 13);
- 2(e). The pleadings, procedural orders and awards may be published but not the documents produced by the parties, the memorials including witness statements and expert reports or transcripts filed, (Draft Confidentiality Order No. 1, at para. 14); and
- 2(f). At the end of the arbitration, all of the documents served by each party on the other must be returned to the party in question and all copies thereof should be destroyed. This is subject to the retention of one copy as a litigation file by counsel to the proceeding (Draft Confidentiality Order No. 1, at Appendix A, para. 3). It is common in international arbitration for copies of all documents (especially evidence including any confidential information) to be either destroyed or otherwise returned. The retention of one full copy of all documents by each party that remains subject to the confidentiality order should be all that is required.

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<sup>32</sup> *S.D. Myers v. Canada*, Procedural Order 16, NAFTA/UNCITRAL Arbitration (May 13, 2000) at para. 16.

### III. MATTERS PERTAINING TO THE HEARING

The agenda items dealing with procedural aspects of the hearing include:

- 1(e). Transcription of Proceedings (Draft Procedural Order No. 1, at para. 28);
- 1(f). Order to Witnesses (Draft Procedural Order No. 1, at para. 40);
- 1(g). Exclusion of Witnesses (Draft Procedural Order No. 1, at para. 44); and
- 2(b). Relief for Breach of Confidentiality Order (Draft Confidentiality Order, No 1, at para 9);

#### *III.A Transcription of Hearings, Agenda item 1(e)*

The Respondent is seeking LiveNote transcription, which would enable transcripts to be immediately available to the parties and to the Arbitral Panel. The Claimant submits that the additional expense of real time transcription and the requirements of computer monitors etc. is unjustified. The evidentiary hearing is likely to last five days. The Claimant submits that counsel in this arbitration are no different than litigation lawyers serving in just about every courtroom in North America: they can keep good notes of the evidence as it goes in. Given that the memorials will provide witness statements and expert reports and extensive argument in advance of the hearing, there is simply no need to have access to the record of proceedings on a real-time basis. Full transcripts will be available shortly after the hearing. It will be more economical without LiveNote transcription and it will also avoid the logistical task of arranging the transcription software, computers and other paraphernalia required.

#### *III.B. Order to Witnesses, Agenda Item 1(f)*

Section 40 of the Draft Procedural Order provides:

At the request of a disputing party, the Arbitral Tribunal may call a witness to appear [**GALLO:** and/or for that witness to bring with him/her documents believed to be under his/her care or control.]

UNCITRAL Rule 24(3) confirms that the Arbitral Tribunal has the power to order the production of documents at any point in the proceeding. It provides:

At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

The witnesses that might be called pursuant to Paragraph 40 of the Proposed Procedural Order include those that have been identified in the Memorials filed in accordance with the schedule that has been agreed by the parties. These are witnesses who have been proffered to, or summoned by, the Arbitral Tribunal and should obviously be required to produce the documents in their control when subject to cross-examination. The Tribunal itself does not possess the authority to hold a witness in contempt, but with the assistance of a court it can generate a summons to appear and it can draw findings of adverse inference as necessary.

The U.S. *Federal Arbitration Act*, 1925, Section 7,<sup>34</sup> provides that the arbitrators may summon a person to attend before them and to produce any material documents.<sup>35</sup> The Canadian *Federal Commercial Arbitration Act* similarly provides in Article 27 that “the arbitral tribunal may request from a competent court of Canada assistance in taking evidence.” As a result, both Canada and the United States provide a mechanism by which production of documents may be compelled of third parties.<sup>36</sup>

With respect to voluntary appearances, Redfern and Hunter states:

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<sup>34</sup> In an arbitration with a set in the US, s. 7 of the *Federal Arbitration Act* (FAA) grants arbitrators the power to subpoena witnesses within the jurisdiction either to appear to give evidence or to disclose relevant evidence in their possession:

The arbitrators selected as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. ...

*Ibid.*, at 340. There is conflicting case law in the United States as to whether third parties who are not party to the arbitration agreement are outside of the scope of the arbitrator’s subpoena power. *Ibid.*, see Ftn 53.

<sup>35</sup> See, e.g.: *re Matter of the Application of Oxus Gold PLC*, Misc. No. 06-82, 2006 WL 2927615, 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006); and *re Application of Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); 2006 WL 3741078, LEXIS 91461 (N.D. Ga. Dec. 19, 2006)

<sup>36</sup> See, e.g. *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands*, (2006) 13 BLR (4th) 1 (Alta CA), leave denied (SCC 1 June 2006).

It sometimes happens in arbitration proceedings that a third party appears voluntarily at the request of one of the parties and gives testimony helpful to that party. Then, on questioning by the other party, the witness may object to the production of documents. The arbitral tribunal does not usually require such a witness to produce documents, but an adverse inference may be drawn in respect of the evidence of the witness in question if it appears to the tribunal that the witness is deliberately withholding documents without good reason.<sup>37</sup>

Section 40 of the Draft Procedural Order supports the drawing of the adverse inference if the witness in question has refused to bring the document to the hearing. Section 40 allows the party conducting the cross-examination to identify beforehand the documents that should be in the possession of the witness and to have the tribunal request that the documents be produced. The time for production from such a witness is at the time of the cross-examination at the hearing itself. The fact that a request has been made provides no opportunity for a witness to claim that he/she was unaware of a request that such documents be produced.

### *III.C Exclusion of Witnesses from the Hearing (Agenda Item 1(g))*

Section 44 of the Draft Procedural Order provides:

A fact witness (as opposed to an expert witness) shall not be present in the hearing room during the hearing of oral testimony, or read any transcript of any oral testimony, prior to his or her examination, except with the express permission of the Arbitral Tribunal. This condition does not apply to expert witnesses [**GALLO:** or to Mr. Vito Gallo, as Claimant in this proceeding][**CAN:** or to officers of the Government of Ontario or the Government of Canada.]

UNCITRAL Rule 25(4) provides that “[t]he arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses.”

The usual rule in civil litigation is that all witnesses to be called will be excluded from the hearing until such time as they have given their evidence. They are then free to watch the rest of the proceeding. This practice is intended to preserve the integrity of the

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<sup>37</sup> Op cit., supra, note 28, at 303

evidence such that it not be influenced by the evidence given during the hearing itself. Expert witnesses are excluded from this general rule. Individuals who are parties to the proceeding are similarly entitled to attend the full hearing. A designated officer or employee of an organization or corporation that is a party to the proceeding is similarly entitled to attend the hearing but this exemption does not extend to all witnesses from that organization or corporation. The Respondent's request that all officers of the Governments of Ontario and Canada who may give evidence may be present throughout the proceedings is far too broad. It is unknown what is meant by the word "officer" and it could well extend to every single witness that the respondent intends to call.

*III.D. Relief for Breach of Confidentiality Order, Agenda Item 2(b)*

The provision in question is as follows:

**[GALLO:** A disputing party may seek relief from the Tribunal for an alleged breach of a Confidentiality Agreement or this Order.]

The Arbitral Tribunal has the power to enforce its procedural orders with respect to the parties before it. These powers include the power to take interim measures, make declarations of the rights of the parties,<sup>38</sup> and to render interim and final awards, including costs. Any of these might provide an appropriate remedy for a breach of a confidentiality order. For example, a declaration that the confidentiality order has been breached may be sufficient for the party seeking relief to bring an application in the domestic court and seek an injunction restraining the party in breach from further disclosure.

In the past, the Government of Canada has itself sought relief for a breach of a confidentiality order. In *Pope & Talbot Inc. v. The Government of Canada*,<sup>39</sup> a letter that was subject to solicitor-client privilege was mistakenly sent by counsel for Canada to responding counsel who leaked it to the press. The Tribunal held:

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<sup>38</sup> Redfern and Hunter, *op cit.*, *supra*, note 28 at 361

<sup>39</sup> September 27<sup>th</sup>, 2000



6. The Tribunal finds Mr. Appelton's behaviour on these matters highly reprehensible. It is not for the parties to determine for themselves what matters in these proceedings should be made public. In Procedural order No. 1, the Tribunal rule that, with exceptions not relevant here, "submissions by the parties to the Tribunal generally are to be kept confidential." Thus, even if the unsigned, draft attachment to Ms. Kinnear's letter to the Privy Council were an actual response to the Tribunal's Procedural Order no. 11, It was not to be made public. Still less was her letter to the Privy Council. ...
8. In short, Mr. Appleton's actions on this matter were either an intentional violation of the Tribunal's Procedural Order No. 1 or a reckless disregard of that Order.
11. The Tribunal accordingly directs the Investor to pay to the Respondent the sum of US \$10,000 no later than October 11, 2000.
12. In so directing, the Tribunal expresses the wish that Mr. Appleton will recognize that it is his conduct which has resulted in this direction being made against the Investor and, consequently, that he will voluntarily personally assume those costs.

Paragraph 40 preserves the right to seek relief before the Arbitral Panel for the breach of a Confidentiality Order. The appropriate relief in the circumstances will be determined by the circumstances of the alleged breach.

#### **IV. PARTICIPATION OF NAFTA PARTIES (ARTICLE 1128) AND AMICUS CURIAE**

##### *IV.A Participation of NAFTA Parties*

The agenda item dealing with this issue is as follows:

- 1(h). Non-Disputing Party and Article 1128 Participation (Draft Procedural Order No. 1, at paras. 47-48).

With respect to the participation of the United States or Mexico in this proceeding, Article 1128 is very clear:

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

Other NAFTA Parties are entitled only to make submissions to a tribunal on a question of interpretation of the treaty text alone. They are not permitted to provide their own view on the facts, or to argue the case. Their submissions must be provided on a timely basis and should be served in advance of the memorials by the parties. In addition, Article 1128 does not provide a right of attendance at the hearings.

### *III.B. The Submission of Amicus Curiae Briefs*

The Arbitral Tribunal has the authority under UNCITRAL Rule 15(1) to consider amicus curiae briefs if the proper circumstances exist. Its discretion is not unfettered, however. In the interests of the equality of the parties, certain factors must be weighed before accepting an amicus submission. The criteria involved in exercising this power includes “the appropriateness of the subject-matter of the case; the suitability of a given non-party to play a role in the case; and the procedure by which the non-disputing party submission was made and considered.”<sup>40</sup> Merely because investor-state arbitration involves a State party does not mean that an overriding public interest exists which must be satisfied by according an unlimited right to make *amicus curiae* submissions in any given case.

The Tribunal [in *Vivendi Universal v. Argentine Republic*] noted that State courts have traditionally accepted so-called amicus curiae submissions from suitable non-parties in cases featuring matters of public interest of an appropriate nature. Nonetheless, the Tribunal considered that the aspect of public interest, on its own, was insufficient to satisfy the requirements. There must be something more – a ‘particular public interest.’ The particular public interest in the *Vivendi* case arose because the dispute revolved around the water distribution and sewerage systems of the City of Buenos Aires and surrounding municipalities. The outcome of the case could affect the operation of these systems, thus providing a legitimate public interest in the subject-matter before the tribunal.<sup>41</sup>

There must exist a “particular public interest” before an amicus curiae brief should be considered by a tribunal. The instant arbitration is not such a case. There is no sufficient public interest involved in the dispute between the parties to warrant the consideration of *amicus curiae* briefs. The outcome of this case will not have any impact on the issue of waste disposal in the Province of Ontario because the Adams Mine certificates and

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<sup>40</sup> Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration*, Oxford International Arbitration Series, 2007, Oxford, at 3.44 at page 58

<sup>41</sup> *Ibid.*, at para 3.45

lawsuits for specific performance have been statutorily eliminated without due process of law and the project cannot be revived as the remedy of specific performance is not available in a NAFTA Chapter 11 case. In this sense, this case can be distinguished from the *Methanex vs. U.S.A.*, where the on-going regulation of fuel additives was at issue. It is also distinguishable from *U.P.S. vs. Canada*, which addressed the on-going regulation and operation of the Canada Post monopoly.

In contrast to the measures at issue in the *Methanex* and *UPS* cases, which involved measures and conduct of general application, the *Adams Mine Lake Act*<sup>42</sup> represented the pinpoint targeting of a particular project and any conceivable causes of action that its owner had or might have had as a result of its uncompensated expropriation. The central issue of this arbitration will be a narrow legal question: whether the passage of such a specific statute, which does not even pretend to be a matter of general regulation, constitutes an act of expropriation or conduct tantamount to expropriation without payment of prompt, adequate and effective compensation equivalent to fair market value, contrary to NAFTA Article 1110. It is simply not possible that an *amicus curiae* is going to be able to shed any particular light on the interpretation of this legal question that could not be provided by the Government of Canada itself.

In the alternative, should the Arbitral Tribunal determine that it will entertain applications by third parties to submit *amicus curiae* briefs, the Claimant submits that while the recommendations contained within the NAFTA Parties' 'Statement of the Free Trade Commission on Non-disputing party Participation' are generally acceptable but in and of themselves, they are not sufficient. Any procedure adopted by the Arbitral Tribunal should consider the following provisions:

- (a). the *amicus curiae* have no standing in the arbitration and that, pursuant to UNCITRAL Rule 25(4), they cannot attend the hearing, absent consent of the parties;
- (b). the *amicus curiae* have no special access to the documents filed in the pleading and are no different than any other member of the public;

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<sup>42</sup> Adams Mine Lake Act, S.O. 2004, c.6, Appendix "A"

- (c). the *amicus curiae* cannot add any factual or legal issue beyond those contained within the published pleadings;
- (d). the submissions may not contain evidence either factual in nature or in the form of an expert opinion and the parties to the arbitration can bring a motion to strike out any portions of an *amicus curiae* brief on the grounds that it contains evidence; and
- (e). the *amicus curiae* should deposit \$25,000.00 as a contribution to the expenses of the Arbitral Tribunal in reviewing amicus submissions and any responding briefs of the parties.

With respect to the prohibition on the submission of any evidence by *amicus curiae*, it would be highly prejudicial to the parties given that the evidence would not be subject to cross-examination at the hearing. In *Methanex v. U.S.A.* (January 15<sup>th</sup>, 2001), the Arbitral Tribunal stated:

The Petitioners [as *amicus curiae*] could not adduce the evidence of any factual or expert witness; and it would not therefore be necessary for either disputing Party to cross-examine a witness proffered by the Petitioners: there could be no such witness. As to the contents of the Petitioner's written submissions; it would always be for the Tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of those submissions were arguably to constitute written 'evidence', the Tribunal would still retain a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight. Of course, if either disputing party adopted a Petitioner's written submissions, the other disputing Party could not then complain at that burden: it was always required to meet its opponent's case; and that case, however supplemented, can form no extra unfair burden or unequal treatment.

The *UPS* Tribunal echoed this approach with its statement that “[t]he third parties would not have the opportunity to call witnesses (given the effect of article 25(4)) with the result that the disputing parties would not face the need to cross-examine them or call contradictory evidence.”<sup>43</sup>

Neither party to the arbitration should be placed in the position of having to determine whether a witness should be called to respond to evidence which is not part of the record.

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<sup>43</sup> *United Parcel Service of America Inc. and Government of Canada*, October 17<sup>th</sup>, 2001, at para 69

It is not a sufficient answer to say that the Arbitral Tribunal has the discretion under Article 25(6) of the UNCITRAL Arbitration Rules to determine its relevance, materiality and weight after admission into the record. The weighing of evidence occurs after the hearing and the prejudice to the parties is the decision that must be made prior to the hearing whether or not to respond to it. As a result, the only prudent decision open to a party to the arbitration would be to respond to the *amicus curiae* “quasi-evidence” because of the risk that it may influence the Arbitral Tribunal. For this reason, the parties to the arbitration should be able to request a ruling as to whether portions of the submission should be struck out as containing evidence before having to make the decision whether to respond to it.

The timetable in which *amicus curiae* submissions may be submitted is also important. Allowing the possibility of further evidence to be adduced by *amicus curiae* at some point after the memorials have been delivered essentially represents a re-opening of the record and might require the submission of responding witness statements and/or other forms of evidence.

With respect to the contribution to the costs of the arbitration, it is clear from the *UPS*, *Glamis* and *Methanex* cases that the acceptance of *amicus curiae* submissions can lead to a substantial exchange of submissions and can add significantly to the costs of the arbitration. The Claimant accordingly submits that if the Arbitral Tribunal is to entertain such submissions, prospective *amicus curiae* should be required to provide a deposit of \$25,000.00 with their submission. Proceedings conducted under the UNCITRAL Arbitration Rules is not the same as civil litigation before a domestic court – the state pays the costs of a court whereas the parties pay the cost of the arbitration. The Arbitral Panel has the authority to impose a fee on prospective *amicus curiae* pursuant to the authority under UNCITRAL Rule 15(1).

**V. SUB-NATIONAL GOVERNMENTS (CONFIDENTIALITY ORDER NO. 1, AT PARA. 1(A));**

Section 1(a) of the Draft Confidentiality Order provides:

“disputing party” means, in the case of the Claimant, Vito G. Gallo, and his heirs, successors and assigns, and in the case of the Respondent, the Government of Canada [**GALLO:** and its sub-State entities, including: the Government of the Province of Ontario and the Regional Municipalities of Toronto, York, Peel, Durham and the District of Timiskaming];

NAFTA Article 105 has been consistently interpreted as demonstrating that action or inaction by a sub-State official is attributable to the State. Obviously, the *Adams Mine Lake Act* was a measure adopted by the Ontario government and there will be substantial communication between provincial and federal officials with respect to the defence of the proceeding. In addition, production of documents will be requested from the various municipalities listed relating to the issues in this proceeding. Given that oral hearings must be held *in camera* and that both the measure and the circumstances of its application involve the conduct of provincial and municipal officials, it is essential that these persons be held accountable under the confidentiality order.

In the *S.D. Myers* case, the Respondent had been sharing documents and information from the arbitral proceedings with provincial government officials not directly involved with the claim. It was ordered to stop, being told to share no more than the basic pleadings (i.e. claim; defence; reply); the procedural orders; and eventual awards with sub-State officials. The Tribunal recognized, however, that:

A special situation would exist in a case where an investor is bringing a Chapter 11 claim against the federal government on the basis that a provincial measure has caused loss to the investor. While the federal government [may] be the respondent in such a case, not the province, the sharing of information with that particular province may be necessary to give Canada a fair opportunity to defend the claim.<sup>44</sup>

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<sup>44</sup> Op cit., Supra, Note 21

This is such a case. The Claimant naturally expects that the Respondent will want to fully disclose documents to responsible officials within the Ontario Government, as well as those of the aforementioned municipalities, which would otherwise be in violation of the Respondent's obligations under Article 25(4). The Claimant also accordingly expects that the obligations contained within the Confidentiality Order will be as binding upon those other government officials as it will be on Canada.

**VI. APPLICABILITY OF CANADIAN DOMESTIC LAW  
(CONFIDENTIALITY ORDER NO. 1, AT PARA. 10);**

The Respondent seeks to include the following clause in the confidentiality order

[CANADA: Notwithstanding any other provision of this Order, any request to the Government of Canada or the Government of Ontario for documents, or the production of documents in other proceedings, under the *Access to Information Act*, the *Privacy Act*, the *Canada Evidence Act*, the *Freedom of Information and Protection of Privacy Act*, the *Evidence Act* or any other applicable federal or provincial legislation, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant legislation]

With this suggested addition to the Draft Confidentiality Order, Canada seeks to supplant international law and the UNCITRAL Rules with its own municipal law so as to: (a) unilaterally determine what government documents may be deemed privileged and therefore withheld from production without even a description of the documents being provided; and (b) publish all of the documents that are exchanged *in camera* between the parties or filed with the Arbitral Tribunal. Indeed the proposal is vaguely worded so as to encompass "any other applicable or provincial legislation," and this would provide an indeterminate basis upon which the Respondent could later argue that evidence or even a witness might be excluded.

*VI.A Scope of Production within the Arbitration*

The Respondent intends to rely on the statutes listed in its proposal to establish claims for privilege in a manner that will limit the scope of production in this Arbitration. Section 39 of the *Canada Evidence Act* provides:

(1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

In past cases, the Respondent has relied on certificates issued under Section 39 of its *Canada Evidence Act* to assert blanket privilege over a very large number of documents. This occurred in earlier arbitrations in which these statutes had not been raised by the Respondent as being potentially relevant at the outset. Those Tribunals rejected the applicability of Section 39 and the certificates that have been issued by the Clerk of the Privy Council. Lord Devaird writing for the Tribunal in *Pope & Talbot v. Canada* stated:

1.3 ... the Tribunal does not in any even consider that s. 39 of the *Canada Evidence Act* is applicable. The Tribunal is not "a court, person or body with jurisdiction to compel the production of information." It is operating under the UNCITRAL Rules. While Article 24(3) of those rules empowers to "require the parties to produce documents, exhibits or other evidence," there is no power to compel that production. Indeed, Article 28(3) characteristics this requirement to produce as an invitation:

If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it. ...

1.5 In the specific context of a NAFTA arbitration where the parties have agreed to operate by UNCITRAL Rules, it is an overriding principle (article 15) that the parties be treated with equality. The other NAFTA parties do not, so far as the Tribunal has become made aware, have domestic law that would permit or require them to withhold documents from Chapter 11 tribunals without any justification beyond a simple certification that they are some kind of state secret. In these, circumstances, Canada if it could simply rely on s. 39, might be in an unfairly advantaged position under Chapter 11 by comparison with the United States and Mexico.

1.6. It is for Canada to determine whether it intends to adhere to its refusal. As matters stand, the Tribunal has no means of knowing what sort of material is being withheld, or to what time scale the material relates. ...

1.7. The Tribunal accordingly as a first steps invites Canada to furnish it with the dates of each of the documents 1-12 referred to, an identification of each document, and an indication of the aspect of the dispute if any to which each document relates. It would be of value to the Tribunal if Canada were able to offer reasons why in



conformity with a general law relating to State secrets those particular documents or any of them should be withheld.<sup>45</sup>

Even after being requested to do so by the *Pope & Talbot* Tribunal, the Respondent did not produce any further documents or provide any explanation. Accordingly, the Tribunal made the following finding in its award:

As noted, during the course of discovery in this proceeding, Canada objected to producing certain items on the ground that, as Privy Council documents, their disclosure was prohibited by the *Canada Evidence Act*. The Tribunal ruled that that Act by its terms did not apply to a Chapter 11 tribunal, and Canada did not contest that ruling. However, it nonetheless refused to produce or even identify the documents in order to permit the Tribunal to make a reasoned judgment as to their relevance and materiality. In the result, this refusal did not appear prejudicial to the Investor, and the Tribunal proceeded upon the basis of the materials actually before it. However, the Tribunal deplores the decision of Canada in this matter. As the Tribunal noted in its decision on this matter dated September 6, 2000, Canada's position could well be a derogation from the "overriding principle" found in Article 15 of the UNCITRAL Arbitration Rules, under which these proceedings have been conducted, that all parties should be treated with equality. Moreover, Article 1115 of NAFTA declares that there shall be "equal treatment among investors of the Parties." As Canada's refusal to disclose or identify documents in these circumstances is at variance with the practice of other NAFTA Parties, at least of the United States, that refusal could well result in a denial of equality of treatment of investors and investments of the Parties bringing claims under Chapter 211.<sup>46</sup>

The *UPS* Tribunal, chaired by Sir Kenneth Keith also determined that Section 39 of the *Canada Evidence Act* did not apply to the production of documents in the NAFTA Chapter 11 arbitration. The panel stated:

While the Tribunal will return to aspects of those arguments it begins with the basic principle, accepted by the parties that Canadian law is directly in point. Canada may not have the advantage of its own law if it is more generous than the law governing the Tribunal. As the Tribunal said in its Decision of 17 October 2001 on the Place of Arbitration a claim for Cabinet privilege "would have to be assessed not under the law of Canada but under the law governing the Tribunal." That law does not in this context refer the Tribunal to national law. Further, s.39(1) in its own terms does not apply to this proceeding since the Tribunal does not have "jurisdiction to compel the production of information."<sup>47</sup>

In each known case in which the Respondent has raised *Evidence Act* defenses to

<sup>45</sup> *Pope & Talbot Inc. v. the Government of Canada*, NAFTA UNCITRAL Decision, September 6<sup>th</sup>, 2000

<sup>46</sup> *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, April 10<sup>th</sup>, 2001

<sup>47</sup> *UPS v. Canada*, October 8, 2004, paragraph 12.

production, tribunals have held that it cannot apply within the context of a NAFTA Chapter 11 proceeding and have proceeded to order the Respondent to provide descriptions of the documents in question, by a specific date, along with an explanation as to the reason for each individual document's being withheld – thereby ignoring the allegedly mandatory character of the Clerk's Certificate urged by the Respondent.<sup>48</sup>

The *Ontario Evidence Act* has a provision that is similar to Section 39 of the *Canada Evidence Act* which permits both political and executive/administrative officials to refuse production outright before local courts and tribunals:

30. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a ministry of the public service of Ontario, if the deputy head or other officer of the ministry has the document in his or her personal possession, and is called as a witness, he or she is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the ministry, to object to producing the document on the ground that it is privileged, and such objection may be taken by him or her in the same manner, and has the same effect, as if such member of the Executive Council or head of the ministry were personally present and made the objection.

Through its attempt to imbed its own laws permitting the flat rejection of production in the Draft Confidentiality Order, the Respondent has attempted to quietly achieve that which it has been unable to obtain before any other NAFTA tribunal: an advantage in the document disclosure process allowing Certificates from the Clerk of the Privy Council to block production. The proposal to include either Evidence Act should be rejected and the document disclosure process should be governed by international law, as per NAFTA Article 1131.

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<sup>48</sup> *UPS v. Canada*, October 8, 2004, at paragraph 14, and *Pope & Talbot v. Canada* (September 6th, 2000), paragraph 1.6.

*VI.B. Publication of documents filed in the Arbitration under the Access to Information Act*

The Respondent has similarly attempted to imbed its access to information and privacy laws into the governing law of this arbitration through the proposal contained in Section 10 of the Draft Confidentiality Order. The inclusion of these laws has the potential to frustrate the *in camera* nature of NAFTA/UNCITRAL proceedings by allowing Canada to provide full production to any citizen upon request of all documents in this proceeding including correspondence between the parties, documents produced, witness statements, expert reports and arguments.

The Respondent has already declared its preference to have all documents in the proceeding made available to the public. It is unlikely that the Respondent will resist the production of any documents to third parties who request production under the Canadian *Access to Information Act* and the equivalent provincial legislation, although it clearly would be entitled to do so.

Pursuant to the *Access to Information Act*, any Canadian person, corporation or landed immigrant may request copies of, or access to, records in the control of the Government of Canada. The Government of Canada may refuse to produce documents on a number of grounds, including “international affairs.”<sup>49</sup> Canada has not used this exemption from production to protect documents produced during NAFTA arbitrations even though it has been available. If the Government makes the decision to release the information, it is required to notify any third party affected. If the third party opposes the release of the information, the matter is referred to a Federal Information and Privacy Commissioner and an appeal lies to the Federal Court Trial Division.<sup>50</sup>

The issue of privacy and confidentiality should be governed by the Tribunal and not

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<sup>49</sup> *Access to Information Act*, Section 15(1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs ...

<sup>50</sup> *Ibid.*, Section 44

Federal and Provincial legislation. The Claimant should be allowed to rely on the procedural orders of the Arbitral Tribunal and/or to bring a motion before the Arbitral Tribunal for a protective order. Once in place, the Government of Canada can resist production if a request for production is received on the basis of the “international affairs” exception, or any other ground that may be available to it. Clearly it would be injurious to the conduct of international affairs were the Government of Canada to act in contradiction to the terms of a confidentiality order or the arbitral rules for the settlement of NAFTA disputes to which it agreed in ratifying and implementing the NAFTA.

A protective order issued by the Arbitral Tribunal will be extremely important in any appeal before the Federal Information and Privacy Commissioner and in any subsequent appeal to the Federal Court Trial Division.

The Arbitral Tribunal should not concede the question of production to Canadian domestic legislation. The Arbitral Tribunal is governed by international law and should not adopt Canadian Federal and Provincial law holus-bolus and concede significant issues related to privilege and production to it. It is not sufficient to say that the *Access to Information Act* process may lead the Respondent into a conflict between a determination by the Arbitral Tribunal to keep a document confidential and a determination made according to domestic law to produce it. The *Vienna Convention on the Law of Treaties* provides in Article 27 which provides “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...”

The *Pope & Talbot* Tribunal rejected Canada’s attempt to use its Access to Information and Privacy legislation as a means to circumvent its confidentiality obligations in an order dated March 11, 2002. The Arbitral Panel stated in part:

At bottom, Canada argues that under the [*Access to Information Act*] any citizen or permanent resident of Canada, simply by filing a written request, must be given access to information otherwise protected by Order No. 5. If that interpretation of the Act is correct, the Tribunal finds it difficult to understand how Canada could have accepted in good faith the undertakings in paragraphs 1 and 2 of order No. 5 (much of which was contained in

Canada's own proposed order) and, indeed, of NAFTA itself. As a Party to NAFTA Canada pledged to follow the UNCITRAL Rules where, as here, they have been properly invoked in a Chapter 11 arbitration. As noted, those rules require in camera hearings. Yet Canada now seems to be saying that that undertaking may be disregarded in the face of a request for hearing transcripts under the ATIA and that that step may be taking without even making a submission to the Tribunal. This Tribunal has no expertise to interpret the ATIA, but it can state that making these documents public will not only violate Order No 5 but, NAFTA itself.<sup>51</sup>

The Claimant submits that the Respondent should not be allowed to effectively imbed its own statutes as governing law for the arbitration with respect to both production of documents and the publication of evidence filed in an *in camera* proceeding. It is therefore requested that the Tribunal deny the Respondent's request to include any of its laws as governing law for purposes of this NAFTA Arbitration.

All of which is respectfully submitted,

Dated: February 29<sup>th</sup>, 2008

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Charles M. Gastle  
Murdoch Martyn  
Danielle Young  
Of counsel: Todd Grierson-Weiler

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<sup>51</sup> Pope & Talbot, Inc. and Government of Canada, NAFTA UNCITRAL Arbitral Decision March 11<sup>th</sup>, 2002 at paragraph 18.

**APPENDIX “A”****ADAMS MINE LAKE ACT, 2004**

S.O. 2004, CHAPTER 6

Consolidation Period: From June 17, 2004 to the [e-Laws currency date](#).

No amendments.

**Definitions**

1. In this Act,

“Adams Mine site” means the abandoned open pit mine, commonly known as the Adams Mine, located approximately 10 kilometres southeast of the Town of Kirkland Lake in the geographic township of Boston in the District of Timiskaming; (“mine Adams”)

“waste” has the same meaning as in Part V of the Environmental Protection Act. (“déchets”) 2004, c. 6, s. 1.

**Prohibition on disposal of waste at Adams Mine site**

2. No person shall dispose of waste at the Adams Mine site. 2004, c. 6, s. 2.

**Revocation of approvals related to Adams Mine site**

3. (1) The following are revoked:

1. The approval dated August 13, 1998 that was issued to Notre Development Corporation under the Environmental Assessment Act, including any amendments made after that date.
2. Certificate of Approval No. A 612007, dated April 23, 1999, issued to Notre Development Corporation under Part V of the Environmental Protection Act, including any amendments made after that date.
3. Approval No. 3250-4NMPDN, dated July 9, 2001, issued to Notre Development Corporation under section 53 of the Ontario Water Resources Act, including any amendments made after that date.
4. Any permit that was issued under section 34 of the Ontario Water Resources Act before this Act comes into force in response to the application submitted by 1532382 Ontario Inc. for New Permit #4121-5SCN9N (00-P-6040) and described on the environmental registry established under the Environmental Bill of Rights, 1993 as EBR Registry Number XA03E0019. 2004, c. 6, s. 3 (1).

No permit for specified application

(2) No permit shall be issued under section 34 of the Ontario Water Resources Act after this Act comes into force in response to the application referred to in paragraph 4 of subsection (1). 2004, c. 6, s. 3 (2).

#### Schedule 1 lands

4. (1) An agreement entered into by Notre Development Corporation or 1532382 Ontario Inc. after December 31, 1988 and before this Act comes into force is of no force or effect if the agreement is with the Crown in right of Ontario and is in respect of,

- (a) the purchase or sale of the lands described in Schedule 1 or any part of those lands;
- (b) the granting of letters patent for the lands described in Schedule 1 or any part of those lands; or
- (c) any interest in, or any occupation or use of, the lands described in Schedule 1 or any part of those lands. 2004, c. 6, s. 4 (1).

#### Letters patent

(2) If any letters patent are issued to Notre Development Corporation or 1532382 Ontario Inc. before this Act comes into force or during the 60 days after this Act comes into force in respect of the lands described in Schedule 1, or any part of those lands,

- (a) the letters patent cease to have any force or effect on the coming into force of this Act or immediately after the letters patent are issued, whichever is later; and
- (b) the lands described in Schedule 1 are vested in the Crown in right of Ontario on the coming into force of this Act or immediately after the letters patent are issued, whichever is later. 2004, c. 6, s. 4 (2).

#### Extinguishment of causes of action

5. (1) Any cause of action that exists on the day this Act comes into force against the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands described in Schedule 1 is hereby extinguished. 2004, c. 6, s. 5 (1).

#### Same

(2) No cause of action arises after this Act comes into force against a person referred to in subsection (1) in respect of the Adams Mine site or the lands described in Schedule 1 if the cause of action would arise, in whole or in part, from anything that occurred after December 31, 1988 and before this Act comes into force. 2004, c. 6, s. 5 (2).

#### Aboriginal or treaty rights

(3) Subsections (1) and (2) do not apply to a cause of action that arises from any aboriginal or treaty right that is recognized and affirmed by section 35 of the Constitution Act, 1982. 2004, c. 6, s. 5 (3).

#### Enactment of this Act

(4) Subject to section 6, no cause of action arises against a person referred to in subsection (1), and no compensation is payable by a person referred to in subsection (1),

as a direct or indirect result of the enactment of any provision of this Act. 2004, c. 6, s. 5 (4).

#### Application

(5) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action in respect of any agreement, or in respect of any representation or other conduct, that is related to the Adams Mine site or the lands described in Schedule 1. 2004, c. 6, s. 5 (5).

#### Same

(6) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action arising in contract, tort, restitution, trust, fiduciary obligations or otherwise. 2004, c. 6, s. 5 (6).

#### Legal proceedings

(7) No action or other proceeding shall be commenced or continued by any person against a person referred to in subsection (1) in respect of a cause of action that is extinguished by subsection (1) or a cause of action that, pursuant to subsection (2) or (4), does not arise. 2004, c. 6, s. 5 (7).

#### Same

(8) Without limiting the generality of subsection (7), that subsection applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief. 2004, c. 6, s. 5 (8).

#### Same

(9) Subsection (7) applies to actions and other proceedings commenced before or after this Act comes into force. 2004, c. 6, s. 5 (9).

#### No expropriation

(10) Nothing in this Act and nothing done or not done in accordance with this Act constitutes an expropriation or injurious affection for the purposes of the Expropriations Act or otherwise at law. 2004, c. 6, s. 5 (10).

#### Compensation

6. (1) The Crown in right of Ontario shall pay compensation to 1532382 Ontario Inc. and Notre Development Corporation in accordance with this section. 2004, c. 6, s. 6 (1).

#### Amount

(2) Subject to subsection (3), the amount of the compensation payable to a corporation under subsection (1) shall be determined in accordance with the following formula:

$$A + B + C$$

where,

A = the reasonable expenses incurred and paid by the corporation after December 31, 1988 and before April 5, 2004 for the purpose of using the Adams Mine site to dispose of waste,



B = the lesser of,

- i. the reasonable expenses incurred by the corporation after December 31, 1988 and before April 5, 2004, but not paid before April 5, 2004, for the purpose of using the Adams Mine site to dispose of waste, and
- ii. \$1,500,000, in the case of Notre Development Corporation, or \$500,000, in the case of 1532382 Ontario Inc.,

C = the reasonable expenses incurred by the corporation on or after April 5, 2004 for the purpose of using the Adams Mine site to dispose of waste, if the expenses are for legal fees and disbursements in respect of legal services provided on or after April 5, 2004 and before this Act comes into force.

2004, c. 6, s. 6 (2).

Same

(3) The amount of the compensation payable to 1532382 Ontario Inc. under subsection (1) shall be the amount determined for that corporation under subsection (2), less the fair market value, on the day this Act comes into force, of the Adams Mine site. 2004, c. 6, s. 6 (3).

Accounting

(4) Subsection (1) does not apply to a corporation unless, not later than 120 days after this Act comes into force, it submits to the Crown in right of Ontario a full accounting of the expenses described in subsection (2), including any receipts for payment. 2004, c. 6, s. 6 (4).

Audit

(5) 1532382 Ontario Inc. and Notre Development Corporation shall provide the Crown in right of Ontario with reasonable access to their records, management staff, auditors and accountants for the purpose of reviewing and auditing any accounting submitted under subsection (4). 2004, c. 6, s. 6 (5).

Application to Superior Court of Justice

(6) 1532382 Ontario Inc., Notre Development Corporation or the Crown in right of Ontario may apply to the Superior Court of Justice to determine any issue of fact or law related to this section that is in dispute. 2004, c. 6, s. 6 (6).

Payment out of C.R.F.

(7) The Minister of Finance shall pay out of the Consolidated Revenue Fund any amount payable by the Crown in right of Ontario under this section. 2004, c. 6, s. 6 (7).

Loss of goodwill or possible profits

(8) For greater certainty, no compensation is payable under subsection (1) for any loss of goodwill or possible profits. 2004, c. 6, s. 6 (8).

Reasonable expenses

(9) For greater certainty, subject to subsection (10), a reference in this section to reasonable expenses incurred for the purpose of using the Adams Mine site to dispose of waste includes reasonable expenses incurred for that purpose for,

- (a) seeking to acquire and acquiring the Adams Mine site;

- (b) surveys, studies and testing;
- (c) engineering and design services;
- (d) legal fees and disbursements;
- (e) marketing and promotion;
- (f) property taxes;
- (g) seeking government approvals; and
- (h) seeking to acquire the lands described in Schedule 1. 2004, c. 6, s. 6 (9).

Same

- [\(10\)](#) For greater certainty, a reference in this section to reasonable expenses,
  - (a) does not include any expense that exceeds the fair market value of the goods or services for which the expense was incurred; and
  - (b) does not include any expense for which 1532382 Ontario Inc. or Notre Development Corporation has been reimbursed by another person. 2004, c. 6, s. 6 (10).
- [7.](#) Omitted (amends or repeals other Acts). 2004, c. 6, s. 7.
- [8.](#) Omitted (provides for coming into force of provisions of this Act). 2004, c. 6, s. 8.
- [9.](#) Omitted (enacts short title of this Act). 2004, c. 6, s. 9.

### SCHEDULE 1

The lands described as:

Location CL 411-A, Boston Township, District of Timiskaming, containing 387.48 hectares;

Location CLM 104, McElroy Township, District of Timiskaming, containing 238.72 hectares;

Parts 1, 2, 3, 4, 5, 6, Plan 54R-2947, Boston Township, District of Timiskaming, containing 14.58 hectares;

Parts 1, 2, 3, Plan 54R-1694, Boston Township, District of Timiskaming, containing 18.76 hectares;

Location CL 936, Plan TER-670, Boston Township, District of Timiskaming, containing 33.46 hectares;

Parts 1, 2, Plan 54R-1807, Boston Township, District of Timiskaming, containing 37.10 hectares;

Parts 1, 2, 3, Plan 54R-1693, Boston Township, District of Timiskaming, containing 12.12 hectares;

Parts 1, 2, Plan 54R-2322, Boston Township, District of Timiskaming, containing 18.69 hectares;

Part 1, Plan 54R-1540, Boston Township, District of Timiskaming, containing 14.48 hectares;

Location CL 1584, Part 1, Plan 54R-1511, Boston Township, District of Timiskaming, containing 16.06 hectares;

Location CL 1221, CL 1222, Parts 1, 2, Plan 54R-1291, McElroy Township, District of Timiskaming, containing 34.02 hectares;

Location CL 1220, Parts 1, 2, 3, 4, 5, 6, 7, Plan 54R-1292, McElroy Township, District of Timiskaming, containing 102.62 hectares;

Parts 1, 2, 3, Plan 54R-1619, McElroy Township, District of Timiskaming, containing 43.28 hectares.

2004, c. 6, Sched. 1.

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